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ABSTRACT

Two 1973 Supreme Court rulings, "Miller v. California" and "Paris Adult Theatre I v. Slaton," consider the problem of obscenity in light of the First Amendment. Chief Justice Burger's stand, which represented that of a five-man majority, was based on the presumption that obscenity is not protected by the First Amendment because it is a form of expression utterly without redeeming social importance. Justice Brennan's position which represented that of the minority, was based on the presumption that legitimate state interests in protecting the public welfare and morality preclude constitutional protection for obscenity. An analysis of the fundamental issues raised in the Burger Brennan clash of opinion reveals basic flaws in the logic of the majority position and suggests that the issue needs to be reexamined. (CC)

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BURGER V. BRENNAN: A DEBATE ON OBSCENITY

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BURGER V. BRENNAN: A DEBATE ON OBSCENITY

On June 21, 1973, the Supreme Court of the United States handed down rulings on Miller v. California (413 U.S. 15) and Paris Adult Theatre I v. Slaton (413 U.S. 49).[1] Writing for a five man majority, Mr. Chief Justice Burger redefined obscenity and charted a relatively new and more conservative judicial approach to what the late Justice Harlan called "the intractible obscenity problem."[2] Mr. Justice Brennan, who had authored Roth v. United States (354 U.S. 476) and most other obscenity opinions prior to Miller, filed a strong dissent for three of the four minority justices -- a dissent which represented an almost complete reversal of his previous position on obscenity. (Mr. Justice Douglas filed a separate dissent in each case.) The majority-minority clash between Burger and Brennan was a direct and fundamental debate over two issues basic to First Amendment considerations of obscenity: (1) the presumption that obscenity was not protected by the First Amendment -- the so-called two-level approach and (2) the presumption that legitimate state interests in protecting the public welfare and morality precluded constitutional protection for obscenity -- a balancing test.

This essay examines these two issues as they were developed by Burger's majority opinions in both Miller and Paris and Brennan's minority opinion in Paris. The Miller reformulation of obscenity standards is, of course, a fait accompli; it remains the current precedent on matters of obscenity. Yet, an analysis of the two fundamental issues raised in the clash of opinions reveals some basic flaws in the essential logic of the majority position.

I

A basic assumption undergirding the control and suppression of obscene material is the so-called two-level approach -- the assumption that obscenity is outside the protection of the First Amendment. As advanced by Mr. Justice Brennan in the long-standing Roth precedent, the approach rested upon the following rationale:

> All ideas having even the slightest redeeming social importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the [First Amendment] guaranties, . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .

> We hold that obscenity is not within the area of Constitutionally protected speech or press.[3]

Clearly, then, the logic behind the two-level approach would deny constitutional protection to obscenity precisely because it is a form of expression utterly without redeeming social importance.

Chief Justice Burger's opinion in Miller reaffirmed the two-level approach as formulated in Roth and, consequently, accepted it as a basic premise for his new formulation. He rejected, however, the Roth-Memoirs definition of obscenity as formulated in Roth and refined in Memoirs v. Massachusetts (383 U.S. 413), and advanced instead a new definition of obscenity as: ". . . work, [which] taken as a whole, appeals to the prurient interest in sex; portrays in a patently offensive way, sexual conduct specifically defined by applicable state law; and, . . . does not have serious literary, artistic, political, or scientific value."[4] Most significantly, Burger expressly rejected the "utterly without redeeming social importance" test advanced in Memoirs. His basic rationale for rejection rested upon his belief that:

> While Roth presumed "obscenity" to be "utterly without redeeming social importance, "Memoirs required that to prove obscenity it must be affirmatively established that the material is utterly without redeeming social value."[5]

According to Burger, the Memoirs formulation was flawed because it forced a prosecutor "to prove a negative, . . . a burden virtually impossible to discharge under our criminal standards of proof."[6] Consequently, although arguing from the same premise as Roth, the Miller opinion virtually rejected the bulk of the Roth-Memoirs formulation.

However, in developing his analysis in Miller, Burger defeated his own logic. He reasserted a two-level approach as his basic justification for suppression of obscenity. Yet, at the same time, he rejected the "utterly without redeeming social value" test, thus effectively denying the essential premise of the two-level approach. This error did not pass without a forceful admonition from Brennan:

> In Roth we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely because it lacks even the slightest redeeming social value. . . . The Court's approach . . . is nothing less than a rejection of the fundamental First Amendment premises and rationale of the Roth opinion and an invitation to widespread suppression of sexually oriented speech.[7]

In prior application, the two-level approach had always been advanced as the only constitutional rationale for suppressing outright a class of speech. Expression defined as obscene could be suppressed because, by definition, it was utterly without any redeeming social value. Broadening that exclusionary justification by demanding

only that the excluded expression lack serious literary, artistic, political or educational value created a situation where, according to Brennan, "some works will be deemed obscene -- even though they clearly have some social value."[8] Thus, in rejecting the social value doctrine, Burger not only did serious damage to the logical consistency of his argument but he did potential damage to the sanctity of the First Amendment.

Equally basic to a rational application of the two-level approach is the view that obscenity is expression (albeit unprotected expression), for the need to identify a class of unprotected expression is the only reason for a two-level justification in the first place. This assumption is basic to an understanding of a second major infirmity in the logic of Burger's Miller analysis, for implicit in his redefinition of obscenity is the view that obscenity is conduct, not expression. The Burger test would ask the trier of fact to determine "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[9] Unlike the Roth-Memoirs formula that would find material (expression) obscene because it is patently offensive,[10] the Miller formula defined obscenity as an offensive description or depiction of illegal sexual conduct.

The rationale behind Burger's scheme seems to be that the depiction of illegal sexual conduct is but a form of the illegal conduct itself. For example, by way of illustrating the applicable state law he intended, Burger referred to Oregon and Hawaii statutes "as examples of state laws directed at depiction of defined physical conduct, as opposed to expression [emphasis added]."[11] And in Paris he observed: "We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct. . . ."[12] Clearly, Burger placed the scope of obscenity beyond expression. In a sense, he seemed to be assuming that in depicting illegal sexual conduct, obscene material was not a communication of ideas but rather an act -- an extension of the illegal sexual conduct itself.

The intended goal of Burger's Miller formulation was a new definition of obscenity that was "carefully limited," and that would enable the courts once and for all to distinguish "hard-core pornography" from expression protected by the First Amendment.[13] The real impact of the Burger reformulation goes well beyond what was intended. First, by implication, Burger seemed to be lightening the prosecutor's burden in controlling obscenity. Indeed, his concern with the prosecutorial burden led him to reject the "social value" test in the first place. The "physical conduct" standard would seem to bring obscenity within that class of conduct embodying both speech and nonspeech elements which the courts have held can be justifiably restricted.[14] Such a result has the very real impact of moving sexual expression further beyond the protections of the First Amendment and, as such, raises the spectre voiced earlier by Brennan of "an invitation to widespread suppression of sexually oriented speech."[15]

Moreover, by defining obscenity as conduct, or at least as an extension of conduct, Burger further undermined the rationale behind the two-level approach which he had reaffirmed and upon which he built his entire opinion. When coupled with the logical infirmity posed by the rejection of the "social value" test, the movement away from expression and towards conduct placed the entire rationale of the two-level approach in significant question. Such a logical weakness could hardly be afforded by Burger in light of the fact that Brennan's dissent implicitly rejected the constitutional viability of the two-level approach.

In dissenting from the Burger position, Brennan took little note of the conduct-expression problem raised in Miller, although he clearly viewed obscenity as expression.[16] Rather, Brennan focused much of his dissent upon a denial of the two-level approach itself. This position represented a rather significant shift for the justice who had authored both Roth and Memoirs.

Brennan's primary rationale and, indeed, his major refutation of the Burger position was, that, however valid or invalid Burger's definition of obscenity, any attempt to distinguish unprotected speech from protected speech was doomed to failure because of the inherent vagueness of the definitional process. The application of a two-level approach demanded "sensitive tools," in order to fully protect freedom of expression. The essence of the problem with Burger's approach was that:

> . . .none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level. . . . Although we have assumed that obscenity does exist and that "we know it when we see it," . . . we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.[17]

Thus, Brennan concluded:

> Whether or not a class of "obscene" and thus entirely unprotected speeech does exist, I am forced to conclude that the class is incapable of definition with sufficient clarity to withstand attack on vagueness grounds. Accordingly, it is on principles of the void-for-vagueness doctrine that this opinion exclusively relies.[18]

Clearly, from Brennan's point of view, Burger's refusal to reject the two-level approach left intact the essential vagueness difficulties of prior formulations. While admitting that the Miller test did limit the definition of obscenity to depictions of physical conduct and, that on first face that limitation might be welcomed, Brennan concluded that "the mere formulation of a 'physical conduct' test is no assurance that it can be applied with any greater facility." Such an application, he observed, "is fraught with difficulty, [and] its application to textual matter

carries the potential for extraordinary abuse. . . . the test offers no guidance to us, or anyone else, in determining which written descriptions of sexual conduct are protected, and which are not.[19] Although Brennan addressed other evils resulting from the problems of vagueness (lack of a fair notice, a chill on protected expression, and serious institutional stress) it is sufficient for our current purposes to note that in drawing the above conclusions, Brennan effectively rejected the two-level approach which had underpinned prior obscenity opinions.

In sum, while the Miller decision claimed to reaffirm the two-level approach, such a conclusion is highly questionable. Despite the fact that Burger asserted the approach as its basic premise, his new formulation which denied the social value test and redefined obscenity as conduct rather than expression, completely contradicted its fundamental logic. In short, his analysis merely pays "lip service" to the two-level approach in an apparent effort to justify the unjustifiable -- that a clear and legitimate separation can be made between protected and unprotected expression. This logical infirmity coupled with Brennan's vagueness analysis effectively denies the continuing viability of the two-level approach to obscenity.

II

The Paris case presented the Court with the issue of whether otherwise obscene material acquired constitutional immunity from state regulation when only exhibited to consenting adults. Accepting the opportunity offered by this issue, the Paris majority, again speaking through Burger, advanced a second justification for regulating obscenity:

> . . . we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests other than those of the advocates are involved. . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself.[20]

The Burger position, thus advanced, is a balancing test wherein legitimate state interests are balanced against any rights advanced by consenting adults to view or obtain otherwise obscene material. Numerous opinions of the Court had, of course, raised the issue of a special state interest in controlling obscenity.[21] However, with the possible exception of Ginsberg v. New York (390 U.S. 629) which dealt with the narrow issue of juvenile protection, no decision by the Court so overtly and forcefully advanced the special interest balancing test as a justification for obscenity suppression as did Burger's majority opinion in Paris. Coupled with the decisions advanced in Miller, Burger's

Paris rulings clearly create a broader range of constitutionally approved tools for the control of obscenity. However, like Miller, this position was flawed by significant logical errors.

From the outset the legitimate state interest argument was premised almost entirely upon assumptions and admitted "unprovables." Burger suggested several areas in which the state could assume a particular interest that could be envoked against obscenity: protection of juveniles, the right to maintain a decent society, public interest in the quality of life, and public safety.[22] Narrowing his argument, he cited the Hill-Link Minority Report of the President's Commission on Obscenity in support of an "arguable correlation between obscene material and crime." Yet he went on to conclude:

> Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.[23]

Franklyn Haiman referred to this particular judgment of Burger's as "[a] bit of know-nothingness on the part of the Supreme Court majority . . . ."[24] The judgment seems well justified, for Burger concluded his analysis in part by claiming: "Nothing in the Constitution prohibits a State from reaching such conclusions [about the negative effects of obscenity] and acting on it legislatively simply because there is no conclusive evidence or empirical data."[25]

Burger further weakened his logical structure through a flawed argument by analogy. He cited, as instances where "legislators and judges have acted upon various unprovable assumptions,"[26] a number of situations having no analogous relationship to the First Amendment: the constitutional regulation of "association" rights through antitrust laws, of "expression" of securities agents "commanding what they must and must not publish and announce," and legislative decisions involving pollution controls and locating highways through national parks.[27] What his argument ignored was that some of these actions, while described in First Amendment language, dealt with conduct -- restraint of trade activity and fraud or misrepresentation -- while others dealt with environmental and property considerations. None of these issues have ever been thought to raise First Amendment questions. In short, his argument by analogy ignored the rather special status of the First Amendment and focused upon assumed and specious similarities.

Finally, Burger's argument is circular. He granted the state of Georgia the right to legislate against obscenity on the basis of unprovable assumptions. That act was justified as constitutional because other courts and legislatures had likewise acted upon unprovable assumptions. At no point in his argument does he offer any rational argumentation defending the validity of the unprovable assumptions.

As a corollary to the special state interest position, Burger rejected any private right of a consenting adult to view obscene material in places of public accommodations. (He does not go so far as to reject the privacy rights asserted in Stanley v. Georgia however.) Implicit in his rejection of a privacy right (and its subsidiary claim to the exercise of free will) is the judgment that watching obscene movies is not an exercise of expression but, rather, in terms of the definitions advanced in Miller, an extension of the obscenity conduct which had no claim to any constitutional protection. Burger allowed for constitutionally protected privacy only in areas concerning "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' [such as] personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing."[28] Accordingly, he concluded that "Nothing . . . in this Court's decisions intimates that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation."[29] Moreover, Burger rejected the argument that free will claims of this nature were constitutionally protected like matter involving politics, religion, and expression. Rather, he made free will to seek out obscenity analogous to misrepresentations in selling securities and to a free will to dispose of garbage or sewage -- this free will did not have the protection of the Constitution.[30] From Burger's language and argument one can only assume that "an individual's desire to see or acquire obscene plays, movies, and books"[31] was not to be equated with exposure to ideas but, rather, with the disposal of garbage and sewage. Thus, Burger concluded that obscenity, as defined in Miller, was not protected by the First Amendment and consequently, "a 'zone' of 'privacy' does not follow a distributor or a consumer of obscene materials wherever he goes."[32] Accordingly:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.[33] [emphasis added]

Finally, Burger rejected, out of hand, the contention that a consenting adult has some special constitutional standing. In support of this judgment he cited suicide, "bare fist" prize fights, duels, bearbaiting, gambling, cockfighting, and prostitution as analogous instances where consenting adults had no standing. By analogy Burger implied that seeking exposure to obscenity was conduct of a similar nature and had no constitutional standing because the actions "debased and brutalized the citizenry . . . ." Thus, "Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public environment."[34]

In refutation of Burger's Paris opinion, Brennan cited both factual and constitutional errors. First, Brennan indicted the opinion for the same vagueness infirmities that had flawed the Miller opinion. Obviously, since Burger had reaffirmed both the two-level approach and his Miller reformulation of obscenity in Paris, he could not avoid Brennan's void-for-vagueness argument. However, Brennan saw an even more serious problem with Paris: "Vagueness becomes even more intolerable [Brennan argued] if one accepts, as the Court today does, a balancing test to see if First Amendment rights should be protected . . .."[35]

Secondly, Brennan essentially rejected every special state interest claimed by Burger with the exception of those intended to protect juveniles and nonconsenting adults. In the first place, Brennan saw significant factual errors in Burger's "arguable [but] unprovable correlation" between obscenity and antisocial conduct. He reminded the Court that Stanley v. Georgia had concluded that "[t]here appears to be little empirical basis for the 'assertion that' exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."[36] Unlike Burger, Brennan also acknowledged the findings of the Majority Report of the President's Commission on Pornography and Obscenity.[37] Thus, Burger's position, supported largely by unprovable assumptions, was weakened when contrasted with Brennan's more authoritative analysis.

The special interest position also received a constitutional challenge in Brennan's dissent. In his judgment, any attempt to protect public morality through suppression of expression would inevitably include some control of the moral content of a person's thoughts, an eventuality "wholly inconsistent with the philosophy of the First Amendment."[38] In addition, the inherent vagueness of such a scheme would, in Brennan's mind, exacerbate the constitutional problems. As he observed:

> But the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined. And. since the attempt to curtail unprotected speech necessarily spills over into the area of protected speech, the effort to serve this speculative interest through the suppression of obscene material must tred heavily on rights protected by the First Amendment.[39]

Thus, Brennan concluded: "Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment."[40]

In sum, Burger's claim of a special state interest in controlling a consenting adult's access to obscene material failed to survive the test of logical and constitutional analysis. Internally flawed by unsupported assumptions and irrelevant analogies, it did not possess adequate validity to withstand the constitutional and factual challenges posed by Brennan. While Burger's argument had the support of a five man majority, its internal weaknesses

are nevertheless present. Flawed constitutionally, factually, and logically, it might not survive a subsequent reexamination by a less ideologically bound Court.

III

The Miller-Paris opinions are the law of the land with regards to First Amendment considerations of obscenity. Five of nine Supreme Court Justices have told us so. This majority status does not mean, however, that the opinion is the best or most reasoned interpretation and application of the First Amendment. Indeed, on the basis of the foregoing analysis, the arguments by Mr. Chief Justice Burger in Miller and Paris would seem to be significantly flawed. This state of affairs is unfortunate given the fact that the opinions have affirmed two issues so basic to the legal status of obscenity within the context of the First Amendment. Perhaps with new issues brought before the Court and with new members finding seats on the Court its obscenity judgments might again be affirmed by arguments with validity and substance.

For many, any formula which limits free expression on the grounds of obscenity is unacceptable. Indeed, it would appear that at least four members of the Supreme Court have now moved closer to this position. Yet, even more intolerable is a formula that justifies suppression on the basis of vague definitional guidelines, that reclassifies expression as conduct on the basis of questionable reasoning, and that encourages suppression based upon unprovable assumptions where legitimate factual data are available. The Miller reformulation coupled with Paris would seem to warrant such a conclusion. To paraphrase Mr. Justice Stewart, while we may not always be able to define good rhetoric, we know it when we see it, and Mr. Chief Justice Burger's opinion in Miller-Paris is not it.

NOTES

[1]Three other cases were ruled on at the same time: Kaplan v. California (413 U.S. 115), United States v. 12 200-Ft. Reels of Super 8MM Film et al (413 U.S. 123), and United States v. Orito (413 U.S. 139).

[2]Interstate Circuit, Inc. v. Dallas, 390 U.S. at 704.

[3]Roth v. United States, 354 U.S. at 484-485.

[4]Miller v. California, 413 U.S. at 24.

[5]Miller, at 21-22.

[6]Miller, at 21-22.

[7]Paris Adult Theatre I v. Slaton, 413 U.S. at 97.

[8]Paris, at 97.

[9]Miller, at 24.

[10]Memoirs v. Massachusetts, 383 U.S. at 418.

[11]Miller, at 24, n. 6.

[12]Paris, at 69.

[13]Miller, at 24, 29.

[14]Miller at 26, n. 8; citing United States v. O'Brian, 392 U.S. 367, 377 (1968) and California v. LaRue, 409 U.S. 109, 117-118 (1972).

[15]Paris at 97.

[16]Paris, at 83-84, 87, 91

[17]Paris, at 84.

[18]Paris, at 86, n. 9.

[19]Paris, at 100.

[20]Paris, at 57-58.

[21]Paris, at 57-58; citing Stanley v. Georgia, 394 U.S. at 567; Redrup v. New York, 386 U.S. 767, 769; United States v. Thirty-seven Photographs, 402 U.S. at 376-377; United States v. Reidel, 402 U.S. at 354-356; Near v. Minnesota, 283 U.S. 607, 716; and Kingsley Books, Inc. v. Brown, 354 U.S. at 440.

[22]Paris, at 57-60

[23]Paris , at 58, 60-61.

[24]Franklyn Haiman, "Freedom of Speech As An Academic Diccip;ine," in Gregg Phifer, editor, Free Speech Yearbook 1976 (Falls Church, Va.: Speech Communication Association, 1977), p. 3.

[25]Paris, at 63.

[26]Paris, at 61.

[27]Paris, at 61-63.

[28]Paris, at 65.

[29]Paris, at 66.

[30]Paris, at 63-64.

[31]Paris, at 63.

[32]Paris, at 66.

[33]Paris, at 67.

[34]Paris, at 68-69.

[35]Paris at 89, n. 11.

[36]Paris at 108; citing Stanley v. Georgia, at 599, n. 9.

[37]Paris at 108, n. 26.

[38]Paris at 108; citing Stanley v. Georgia, at 565.

[39]Paris, at 109.

[40]Paris, at 112.